Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting Against National Security Threats	)	WC Docket No. 18-89
to the Communications Supply Chain Through	)	
FCC Programs	)	

COMMENTS OF RURAL WIRELESS BROADBAND COALITION

Rural Wireless Broadband Coalition ("Coalition"),[1] by counsel, hereby responds to the Wireline Competition Bureau's ("WCB's") public notice soliciting comments on the applicability of § 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("2019 NDAA")[2] to the Notice of Proposed Rulemaking in this proceeding.[3]

INTRODUCTION

The WCB is examining whether the provisions of § 889 of the 2019 NDAA are relevant to the Commission's proposed rule "to prohibit the use of Universal Service Fund (USF) support to purchase equipment or services from any company identified as posing a national security risk to communications networks or the communications supply chain." Public Notice at 1. The proposed prohibition reflects the Commission's concern — which it shares with the Executive Branch and Congress — that certain foreign communications equipment providers pose a threat to the security of America's communications networks.[4] Enacted nearly four months after the

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[1] Coalition members include Union Wireless, Viaero Wireless, Bristol Bay Cellular, Pine Cellular Phones, Inc., SI Wireless, LLC, United Wireless Communications, and AST Telecom. The Coalition was formerly known as the Rural Broadband Alliance, and it filed comments in this proceeding on June 1, 2018 and July 2, 2018.

[2] *See Wireline Competition Bureau Seeks Comment on Section 889 of John S. McCain National Defense Authorization Act for Fiscal Year 2019*, DA 18-1099, 2018 WL 5617606 (Oct. 26, 2018) ("Public Notice").

[3] *See Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, FCC 18-42, 2018 WL 1872122 (Apr. 18, 2018) ("*NPRM*").

[4] *See NPRM* at 1-3 (¶¶ 1-6).

Commission released its *NPRM*, § 889 of the 2019 NDAA addresses that same concern and should be considered superseding legislation. The provisions of § 889 most relevant to the Commission's proposed rule are the following:

> (a) PROHIBITION ON USE OR PROCUREMENT.—(1) The head of an executive agency may not—
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> (A) procure or obtain or extend or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or
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> (B) enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.[5]
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> (b) PROHIBITION ON LOAN AND GRANT FUNDS.—(1) The head of an executive agency may not obligate or expend loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems described in subsection (a).
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> (2) In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs … shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained. [6]

As one can plainly see, the two statutory prohibitions are significantly different, and more narrowly tailored, than the broad prohibition proposed by the Commission. Consequently, the WCB has sought guidance with respect to whether the Commission's proposed rule can be

[5] 2019 NDAA § 889(a)(1).

[6] *Id*. § 889(b)(1).

reconciled with § 889 of the 2019 NDAA. In our view, the WCB has raised two paramount legal issues: (1) whether the § 889(b)(1) prohibition applies to USF support; and (2) whether § 889(b)(1), standing alone or in conjunction with § 889(a)(1), authorizes the Commission to adopt its proposed rule. *See* Public Notice at 2. We will address those issues solely as a matter of statutory construction, and we will show that the Commission's proposed rule has not survived the passage of the 2019 NDAA.

DISCUSSION

I. SECTION 889 OF THE 2019 NDAA CANNOT BE CONSTRUED TO APPLY TO USF SUPPORT PROGRAMS

The provisions of § 889 of the 2019 NDAA simply cannot be read in context to apply to the USF support programs. In the first place, the 2019 NDAA was an act to authorize appropriations for fiscal year 2019. Therefore, the provisions of § 889 should be construed fundamentally as part of a statute that governs how congressionally appropriated funds can be used by a federal "executive agency." The USF support programs do not use funds appropriated by Congress. They distribute funds contributed by telecommunications carriers pursuant to § 254(d) of the Communications Act of 1934, as amended ("Act"). *See* 47 U.S.C. § 254(d). Thus, the § 889(b)(1) prohibition on "loan and grant funds" should not be interpreted expansively to apply to the funds that were contributed to the USF by telecommunications carriers and ultimately used to provide federal universal service subsidies.[7]

The language of the § 889(a)(1) prohibition renders it inapplicable to the USF programs. The prohibition is imposed on the "use or procurement" of "covered telecommunications

[7] We note that USF contributions "exist because of a federal mandate," but they "are not defined as federal funds." *In re Incomnet, Inc.*, 463 F.3d 1064, 1066 (9th Cir. 2006).

equipment or services," as such is defined in § 889(f)(3), by the head of an executive agency, and § 889(a)(1)(A) provides that a head of an executive agency may not "procure or obtain" such equipment or services. The use of the nearly synonymous words "use," "obtain," "procure," and "procurement,"[8] as well as the incorporation of definition of "executive agency" given in Title 41 (Public Contracts) of the United States Code,[9] suggests that Congress intended that the § 889 prohibitions apply to government contracts that entail the expenditure of appropriated funds for covered telecommunications equipment or services. That interpretation is confirmed by the plain meaning of the operant language of § 889(a)(1).

Section 889(a)(1) expressly provides that an agency head may not "procure or obtain or extend or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services,"[10] or "enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses" such equipment or services.[11] At a minimum, those provisions limit the Commission's authority to procure, obtain, enter into, extend or renew a contract. They have no application to USF support, because the Commission simply does not procure, obtain, enter into, extend, or renew any contracts in conjunction with any of the USF support programs. USF support is provided subject

[8] The word "use" normally means "to employ for some purpose; put into service; make use of." *Random House Webster's Unabridged Dictionary* 1541 (2d ed. 2001). The word "obtain" means "to come into possession of; get, acquire, or procure, as through an effort or by a request." *Id.* at 1338. The word "procure," on the other hand, means "to obtain or get by care, effort, or the use of special means." *Id*. at 1543. Congress defined the word "procurement" to include "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111.

[9] Section 889(f)(4) of the 2019 NDAA provides that the term "executive agency" has the meaning given the term in 41 U.S.C. § 133. Specifically, that definition is given in the "Federal Procurement Policy" provisions of Subtitle I of Title 41. *See* 41 U.S.C. § 133.

[10] 2019 NDAA § 889(a)(1)(A).

[11] *Id*. § 889(a)(1)(B).

to §§ 214(e) and 254 of the Act and Part 54 of the Commission's rules, but not the terms of a contract to which the Commission is a party.

The § 889(b)(1) prohibition on "loan or grant funds" does not apply to USF support because, as we have shown, the Commission does not loan or grant congressionally appropriated funds under the USF support programs. Moreover, the Commission does not "obligate or expend loan or grant [USF support] funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain" covered telecommunications equipment or services."[12] The Universal Service Administrative Company ("USAC") obligates or expends USF support and, the Commission itself neither procures, obtains, enters into, extends, nor renews contracts in conjunction with the USF support programs.

Finally, § 889(b)(2) does not apply to the Commission's proposed rule inasmuch as the USF is not a "loan, grant, or subsidy" program administered by a "head of an executive agency." USAC is the entity responsible for administering the USF. *See NPRM* at 5 (¶ 11). And USAC is most assuredly not an "executive agency" for the purposes of § 889.[13]

It is noteworthy that Congress only used the terms "Federal Communications Commission" and "subsidy programs" in § 889(b)(2), which is best read to authorize the Commission to "prioritize" available USF funding to assist entities affected by § 889 "to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained." For

[12] *Id.* § 889(b)(2).

[13] USAC is neither an "executive department" specified in 5 U.S.C. § 101, a "military department" specified in 5 U.S.C. § 102, an "independent establishment" as defined in 5 U.S.C. § 104(1), nor a "wholly owned Government corporation." 41 U.S.C. § 133. USAC is "an independent, not-for-profit corporation." *United States ex. rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379, 381 (5th Cir. 2014).

example, if a carrier participating in the USDA's Community Connect Grant Program were required to replace equipment, § 889(b)(2) would authorize the Commission to prioritize USF support to assist in ensuring that rural consumers continue to have service.

We submit that nothing in § 889 directly applies to the USF support programs, and that the text of § 889 would foreclose its application to those programs. For the Commission to interpret the text otherwise would be impermissible and *ultra vires.* *See generally City of Arlington, Texas v. FCC*, 569 U.S. 290, 297-98 (2013). And if § 889 does not apply to USF support, it certainly did not authorize the Commission to adopt a rule prohibiting the use of such support to purchase equipment or services from any company identified as posing a national security risk.

II. SECTION 889 CANNOT BE CONSTRUED TO AUTHORIZE THE COMMISSION TO PROHIBIT THE USE OF USF SUPPORT TO PURCHASE EQUIPMENT AND SERVICES

As we argued previously in this proceeding, the adoption of the proposed rule would impose staggering costs, especially on small rural carriers.[14] When it enacted § 889 of the 2019 NDAA, Congress was aware of the Commission's proposal. Had Congress wanted to authorize the Commission to adopt a rule of such economic consequence, it would have done so in clear terms. *See Utility Air Regulatory Group v. EPA,* 134 S. Ct. 2427, 2444 (2014) (Congress is expected to "speak clearly" if it wishes to assign to an agency decisions of vast economic significance). It chose not to do so when it enacted the 2019 NDAA. In effect, Congress withheld authority from the Commission to prohibit the expenditure of USF support to purchase covered communications equipment and services. Faced with this legislative evidence of congressional intent, the Commission cannot construe § 889 to authorize it to adopt its proposed rule.[15]

[14] *See* Reply Comments of Rural Wireless Broadband Coalition, WC Docket No. 18-89, at 24-28 (July 2, 2018).

[15] An interpretation of § 889 as authorizing the Commission to adopt its proposed rule would not garner deference

III. THE ACT DOES NOT AUTHORIZE THE COMMISSION TO ADOPT ITS PROPOSED RULE

The Commission's legal authority to protect America's communication networks from national security threats was very much in doubt before Congress enacted § 889 of the 2019 NDAA. The Commission claimed that its authority under § 254(e) of the Act to "designate the *services* for which USF support will be provided" extended to placing its proposed "condition on the *use* of USF funds."[16] It found in the § 254(e) requirement that a carrier receiving USF support must "use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended"[17] the authority to adopt a rule that would make it unlawful for the recipient to use the support "to purchase or obtain any equipment or services produced or provided by any company posing a national security threat…." *NPRM* at 16. The Commission's interpretation of § 254(e) would transform a requirement that Congress imposed on carriers to use USF support to *provide facilities and service* to a congressional grant of authority to the Commission to make it unlawful for carriers to use USF support *to purchase or obtain equipment and services* from certain third parties. By so doing, the Commission went way beyond "the bounds of reasonable interpretation." *Arlington*, 133 S. Ct. at 1868.

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under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), primarily because the preconditions to *Chevron* deference have not been satisfied. *See Arlington,* 569 U.S. at 307. Congress has not "unambiguously" vested the Commission with the general authority to administer the 2019 NDAA "through rulemaking and adjudication." *Id.*

[16] *NPRM* at 12 (¶ 35) (emphasis added). The Commission also found that its authority under § 201(b) "to promulgate 'such rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act'" empowered it to adopt its proposed rule. *Id*. (quoting 47 U.S.C. § 201(b)). Section 201(b) authorizes the Commission to adopt a rule that is necessary "to carry out the provisions" of § 254. It does not grant the Commission the regulatory authority to prohibit the use of USF support to purchase or obtain equipment or services provided by a particular vendor.

[17] 47 U.S.C § 254(e) (emphasis added).

The Commission also went too far when it adopted the Tenth Circuit's patently incorrect statement that "'nothing in the statute limits the FCC's authority to place conditions … on the use of USF funds.'"[18] Obviously, the Commission's power to impose any conditions is limited by § 154(i) of the Act, which provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (emphasis added). And, as at least one commenter showed, the imposition of the Commission's proposed condition would be inconsistent with the provisions of § 254 of the Act.[19]

We submit that the Act does not authorize the Commission to adopt its proposed rule. Consequently, the Commission must turn to § 889 of the 2019 NDAA for its authority to proceed. But to do so, the Commission must substantially amend its proposed rule to conform with § 889. We turn to that issue next.

IV. ADOPTION OF THE PROPOSED RULE WOULD CONFLICT WITH SECTION 889

In order to be valid, a Commission rule must "carry into effect the will of Congress as expressed in [a] statute, and a rule that "operates out of harmony with the statute is a mere nullity." *United States v. Larionoff*, 431 U.S. 864, 873 n.12 (1977) (quoting *Manhattan General Equipment Co.*, 297 U.S. 129, 134 (1936)) (internal punctuation omitted). Therefore, it is the Commission's responsibility "to conform its rules to any pertinent new laws." *Taylor v. Quality Hyundai, Inc.,* 150 F.3d 689, 693-94 (7th Cir. 1998) (citing *Larionoff*, 431 U.S. at 873 & n.12). The

[18] *NPRM* at 12 (¶ 35) (quoting *In re FCC 11-161*, 753 F.3d 1015, 1046 (10th Cir. 2014)). The Commission quoted the Tenth Circuit out of context. The Court's statement concluded its interpretation of subsections (c)(1) and (e) of § 254. *See* 753 F.3d at 1045-46. It should have stated, "In other words, nothing in § 254(c)(1) limits the FCC's authority to place conditions … on the use of USF funds."

[19] *See* Comments of Competitive Carriers Association, WC Docket No. 18-19, at 15-23 (June 1, 2018).

2019 NDAA constitutes a new law that is pertinent to the rule that the Commission is proposing in this proceeding. However, the proposed rule is inconsistent with § 889 of the 2019 NDAA in the following significant respects:

- Section 889(b)(1) applies only with respect to "covered telecommunications equipment and services," a term defined to include "telecommunications equipment" and "telecommunications … services" produced or provided by five named entities (or any subsidiary or affiliate of those entities)[20] or by "an entity that the Secretary of Defense … reasonably believes to be … owned or controlled by, or otherwise connected to, the government of [the People's Republic of China]."[21] The proposed rule, by contrast, would preclude the use of USF funds to buy products and services irrespective of whether the product or service constitutes "covered" telecommunications equipment or "covered" telecommunications service as such are defined in § 889(f)(3).

- Section 889(b)(1) applies only with respect to the use of covered telecommunications equipment or services "as a substantial or essential component" or "as critical technology." However, the proposed rule would preclude the use of USF funds to purchase equipment or services or services from the five named entities irrespective of whether the equipment or services would be used as a "substantial or essential component" or as "critical technology."

- Section 889(b)(3) exempts the procurement of "a service that connects to the facility of a third-party, such as backhaul, roaming, or interconnection arrangements," [22] as well as the procurement of "telecommunications equipment that cannot route or redirect user data or traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles."[23] The proposed rule includes no comparable exemptions.

- Section 889(b)(2) contemplates that the Commission would "prioritize" available USF funding to assist entities affected by § 889 "to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained." The proposed rule makes no provision for such assistance.

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[20] Congress named Huawei Technologies Company, ZTE Corporation, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company. *See* 2019 NDAA § 889(f)(3).

[21] *Id.* § 889(f)(3)(D).

[22] *Id.* § 889(a)(2)(A).

[23] *Id.* § 889(a)(2)(B).

In order to conform its proposed rule to § 889, the Commission must issue a further notice of proposed rulemaking ("FNPRM") that includes, *inter alia*, the "terms or substance" of a proposed rule that is consistent with those of the new law. 5 U.S.C. § 553(b)(3). The issuance of a FNPRM is necessitated by the requirement of § 553 of the Administrative Procedure Act that the rule the Commission adopts be a "logical outgrowth" of the NPRM. *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1079 (D.C. Cir. 2009). "A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Id.* A rule that conforms with § 889 would not qualify as a logical outgrowth of the NPRM, because interested parties could not have anticipated the subsequent enactment of the 2019 NDAA, and they obviously could not have filed comments on the substance of a rule that would conform to that yet-to-be-enacted legislation.

Respectfully submitted,

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